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No. 09-90

Supreme Court, U.S.
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In The
Supreme Court of the United States

KATHLEEN PIERCE, et al.,
Petitioners,

v.

SAN DIEGO UNIFIED PORT DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The United States Court of Appeals for the Ninth Circuit affirmed the District Court's orders granting Respondent San Diego Unified Port District's motion for summary judgment against Petitioners Kathleen Pierce and Matthew Morgan. In doing so, the Ninth Circuit properly ruled that Respondent: 1) did have authority to seize the vessel which was in violation of Respondent's anchoring laws, 2) did not violate Petitioners' due process rights, and 3) is not liable under the standards set forth for a violation of 42 U.S.C. Section 1983 established in *Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978).

One Question is presented:

1. Did the Ninth Circuit use erroneous factual findings in reaching its ruling and therefore its interpretation of the law departed from and is contrary to the standard for the Respondent to be liable for a violation of 42 U.S.C. Section 1983, established in *Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below are identified in the caption of the case.

The San Diego Unified Port District is a public entity organized and existing under the provisions of the San Diego Unified Port District Act.

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I.

INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of Certiorari to be granted (Petition). *See*, Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that, the United States Court of Appeals for the Ninth Circuit, April 22, 2009, Opinion is in conflict with a decision of another United States court of appeals on the same important matter; or has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Petitioners fail to demonstrate that the Ninth Circuit decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decision of this Court. *See* Sup. Ct. R. 10(a)-(c). In fact, Petitioners make only half-hearted attempts to demonstrate that both the district court and the Ninth Circuit misinterpreted and misapplied the statutory law by failing to consider factual issues and by relying on erroneous factual issues. Petitioners' allegations are incorrect and, in any event, constitute insufficient grounds to grant the Petition. *See* id. Therefore, the Petition should be denied.

At the outset, Petitioners contend that the district court and the Ninth Circuit, erroneously found that Respondent was not required to seek an injunction in order to enforce a violation of Respondent's code section 4.35 because code section 8.25 was in existence

at the time of the seizure of the vessel, and 8.25 did not require Respondent to seek an injunction. Petitioners contend that, until 2004, Respondent's only means of enforcing its applicable code sections was through an injunction, and that since the vessel was seized in 2002 an injunction was Respondent's only remedy.

Petitioners' allegation is a misstatement of fact and law. On September 4, 2001, Respondent adopted Ordinance 2148 which amended code section 8.25 to reflect that the Executive Director or any harbor police officer is authorized to remove and impound any vessel, watercraft or object found in violation of Federal or State law or provision of Respondent's code. The Ordinance went into effect before the events giving rise to this lawsuit, not in 2004, as Petitioners contend. As a result, the district court and Ninth Circuit properly found, Respondent's code section 8.25 provides for the impoundment of any vessel, watercraft or object found in violation of any Federal or State law or provision of Respondent's code, and therefore the injunction was not Respondent's only remedy.

Petitioners also claim that Respondent failed to comply with procedural requirements under the California Harbors and Navigation Code, prior to disposition of the vessel and that, as a result, violations of Petitioners' due process rights have gone unchecked by both the district court and the Ninth Circuit.

Petitioners' allegation is a misstatement of fact and law. Petitioners contend that, the vessel was registered with the DMV and, therefore, Harbors and Navigation Code section 500 et seq. dictated the notice

and disposition procedures that the Respondent had to follow regarding the vessel. Petitioners allege that Respondent violated these code provisions by destroying the vessel without conducting a mandatory lien sale.

However, in this case, in addition to Petitioners having actual and constructive notice of the seizure and pending destruction of the vessel if the owner did not take possession of it, the district court and Ninth Circuit properly found, Petitioners could not show a failure to follow state or local ordinances because the provisions of the Harbors and Navigation code they point to do not bind Respondent. Harbors and Navigation Code section 500 et seq. is commonly known as the "Boaters Lien Law" and provides procedures for parties holding possessory liens against boats to recover their interest by forcing a lien sale. (*See*, Harbors and Navigation Code section 500 et seq.) Sections 522 and 526 of the Harbors and Navigation Code give public entities authority to dispose of abandoned vessels in accordance with the procedures provided therein. However, nothing in Sections 522 or 526, or elsewhere in the Harbors and Navigation Code section 500 et seq., purports to limit a public entity's authority to dispose of boats taken into custody for other reasons, such as is the case here, where Petitioners' vessel was in violation of Respondent's anchoring laws.

Respondent's code section 8.25(4) addresses the Respondent's authority to dispose of vessels if, as here, the owner or agent of any such vessel, watercraft or object cannot be found within Thirty (30) days, or as here, the owner or agent has actual knowledge of the seizure and storage of the vessel and refuses to pay the

lawful costs and expenses associated with the vessel's storage, and as in this case, instead of retrieving the vessel, merely abandons it.

Respondent complied with its procedures as mandated in Respondent's code section 8.25. Thus, the district court and the Ninth Circuit properly found that the Respondent had authority to dispose of the vessel, pursuant to Respondent's code section 8.25.

Finally, Petitioners' contention that review by this Court is warranted because the district court and Ninth Circuit relied on an erroneous factual determination is far-fetched.

Petitioners allege that former Port Director Don Nay, (deceased) authorized Petitioners' vessel to rest in the location from which it was seized. The district court and Ninth Circuit properly found that, despite Petitioners' contention, there is no evidence to create a genuine issue of material fact as to whether Mr. Nay had the authority or the authorization to allow the Vessel to be exempted from Respondent's code. Petitioners only point to Mr. Nay's authority to enter into contracts for the removal of vessels found in violation of Respondent's code and do not have any evidence to support their contention that, an oral agreement was made with the then-Executive Director to not follow the Respondent's code, which regulates vessel storage.

Simply put, Petitioners have failed completely to carry their burden of demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

II.

STATEMENT OF THE CASE

It is undisputed that on January 22, 2002, Respondent impounded Petitioners' vessel for being in violation of Respondent, San Diego Unified Port District Code provisions. The vessel had been anchored for over two years in an un-seaworthy condition, and did not have a permit to anchor in the San Diego Bay. Respondent's Harbor Police obtained certificate numbers and registration information related to the vessel in an attempt to determine the legal and registered owners, in order send notice of the vessel's seizure and offer an opportunity for post storage hearing. Respondent sent notice of the vessel seizure, and a request form that can be used by owners to request a post storage hearing, to the legal and registered owners of the property by certified mail.

All notices were returned to Respondent because, as Petitioners admit, Petitioners did not follow the appropriate vehicle code provisions specifically enumerated in Vehicle Code section 9865, which requires that any holder of a certificate of number shall notify the department within 15 days, if his address no longer conforms to the address appearing on the certificate and shall, as part of such notification, furnish the department with his new address.

In addition, Petitioners did not follow Respondent's code section 4.36, which requires that a vessel owner who designates a watchman to provide that information to Respondent. However, James Morgan, (dismissed from the case because he lacked standing as an owner) admitted to being the watchman for the

vessel. Petitioner Matthew Morgan admits that James Morgan was entrusted with the safekeeping of his vessel, and that Petitioner Matthew Morgan received notice of the seizure from his grandfather, watchman James Morgan. Petitioner, Kathleen Pierce admits that she entrusted the safekeeping of her vessel to watchman James Morgan. Watchman James Morgan's claim submitted to the District on August 5, 2002, admits to being the watchman 24 hours a day since 1999 and admits to notice of the seizure of the vessels.

Moreover, the seizure was shown on three local television news networks in the area, specifically, Channel 10 KGTV news, Channel 6 XETV news, and Channel 8 KFMB news, wherein watchman James Morgan is shown acknowledging the vessel seizure while being interviewed on the television news videotapes as the vessels were actually being seized. The videotapes also show Respondent's Harbor Police officer calling for the owner to come forward or the vessel may be destroyed. Also, the Union Tribune, the San Diego newspaper of general circulation, reported in two news articles about the seizure and possible destruction of the vessel and noticed the owner to come forward or the vessel may be destroyed.

Further, on February 4, 2002, watchman James Morgan sent a letter to Respondent inquiring as to the impound fees of the seized vessel, further indicating actual notice of the seizure of the vessel.

On February 21, 2002, Respondent's Deputy Port Attorney responded to the watchman's inquiry of February 4, 2002 and again on March 19, 2002, wrote a follow up letter to watchman James Morgan stating

that, the owner could retrieve the vessel at any time by presenting proof of ownership and paying all impoundment-related fees due on the date of retrieval and informed watchman James Morgan that, should no one claim the vessel and pay all fees by April 1, 2002, it will be destroyed.

However, for some reason unknown to Respondent, Petitioners' watchman never alerted Petitioners about the seizure of the vessel and correspondence between Respondent and watchman James Morgan.

The April 1, 2002, destruction date arrived, and Respondent waited an additional two months for the Petitioners or their watchman to claim the vessel, and thereafter, pursuant to Respondent's code section 8.25, Respondent properly disposed of the vessel on June 15, 2002, only after notice was given and no one attempted to retrieve the vessel.

Thereafter, watchman James Morgan and Petitioners quickly filed claims with Respondent. Watchman James Morgan filed a claim on June 28, 2002 and re-filed on August 5, 2002.

Petitioner Matthew Morgan filed a claim with Respondent on June 24, 2002. Respondent denied Petitioners' claims and thereafter Petitioners filed separate complaints in the district court against Respondent alleging 4th and 14th amendment due process violations, pursuant to 42 U.S.C. 1983.

III.

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE THE LOWER COURTS DID NOT USE ERRONEOUS FACTUAL FINDINGS IN REACHING A RULING AND THEIR INTERPRETATION OF THE LAW IS NOT A DEPARTURE FROM AND IS NOT CONTRARY TO THE STANDARD IN ORDER FOR THE RESPONDENT TO BE HELD LIABLE FOR A VIOLATION OF 42 U.S.C. SECTION 1983 ESTABLISHED IN *MONELL* AND ITS PROGENY.

In order for the Respondent to be held liable for a violation of 42 U.S.C. section 1983, a plaintiff must show that the due process violation resulted from an official policy or custom. *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 661 (1978). There are five ways a plaintiff may establish the existence of a policy or custom sufficient to impose section 1983 liability on a public entity such as the Respondent: 1) actions of municipal legislative bodies; 2) agencies exercising delegated authority; 3) individuals with final decision-making authority; 4) a policy of inadequate training or supervision; and 5) custom. Id.

As the district court recognized, it appears that Petitioners attempt to show that the due process violation occurred due to the act of an individual with final decision-making authority. Petitioners allege that the seizure and destruction was carried out through the official policy of the Respondent.

Additionally, because Petitioners allege that they did not have proper notice to appeal or contest the Respondent's decision to remove the vessel, they argue that the decision to seize and destroy the vessel was a final decision that was not subject to review.

To establish liability under 42 U.S.C. section 1983 as alleged by Petitioners, the Petitioners must establish that the Respondent maintained a pervasive and persistent policy or custom of fostering and tolerating police misconduct that caused the alleged constitutional violations of the Harbor Police. *Monell* at 690-95; *Carter v. District of Columbia,* 795 F.2d 116, 125 (D.C. Cir. 1986). Petitioners cannot recover against the Respondent on a section 1983 cause of action merely because it employed the police officers that allegedly violated Petitioners' constitutional rights. Id.

Moreover, a single incident involving only one or even a few police officers or scattered, non-systemic misconduct is not sufficient to establish fault on the part of the Respondent. See, *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 824 (1985). Instead, Petitioners must prove that the Respondent, through its official policymakers, maintained a policy or custom that caused the violation of the Petitioners' constitutional rights. *Monell*; *Carter*. In *Monell*, *supra*, the court stated that, "a local government may not be sued under section 1983 for an injury inflicted by its employees or agents." *Monell*, at 694. It is now firmly established that such a plan or policy may not be proved through reference to a single unconstitutional activity unless "proof of the incident includes proof that it was caused by an existing, unconstitutional (municipal) policy." *Tuttle*, at 824.

In addition, Petitioners must not only allege and later prove facts sufficient to substantiate a pattern or practice, but Petitioners must also demonstrate that it was the moving force or cause of the constitutional violations the Petitioners allege. *Monell*, 436 U.S. at 694. Liability requires an action taken pursuant to a wrongful policy. "When an official's discretionary decisions are constrained by a policy not of that official's making, the policy, rather than the subordinate's departure from them, is the act of the municipality." *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). Thus, an employee who has the discretion to act pursuant to an otherwise valid policy and who exercises that discretion in an unconstitutional manner, will not create *Monell* liability because the exercise of discretion, not the municipal policy, caused the constitutional violation. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

Here, Petitioners allege that the Respondent violated its ordinances and as a result violated Petitioners' due process rights.

However, Petitioners have not alleged facts sufficient to substantiate a pattern or practice by the Respondent, and Petitioners have not demonstrated that it was the moving force or cause of the constitutional violation that Petitioners allege. Liability requires an action taken pursuant to a wrongful policy. Since the Harbor Police's discretionary decisions as they relate to the seizure of vessels are constrained by Respondent's policy not of their making, the policy, rather than the subordinate's departure from them, is the act of the municipality. Petitioners have not shown that the Respondent, through its official policymakers, maintained a policy

or custom that caused the violation of the Petitioners' constitutional rights. Consequently, the district court and Ninth Circuit properly found that Petitioners' 42 U.S.C. section 1983 allegation must fail, as Petitioners have not shown that the due process violation allegations resulted from an official Respondent policy or custom.

A. Respondent Had Authority Pursuant to District Code Section 8.25 to Seize the Vessel Without Seeking an Injunction.

On September 4, 2001, the Respondent amended Respondent's code section 8.25 to authorize the Executive Director or Harbor Police to remove and impound any vessel, watercraft or object found in violation of any Federal or State law or provision of the Respondent's code, which includes code section 4.35.

Specifically, the Ordinance states:

> WHEREAS, *in order to preserve the public peace, health and safety of San Diego Bay, the District desires to amend said Section 8.25, Subsections (a)1 and (a)2, to reflect that the Executive Director or any harbor police officer is authorized to remove and impound any vessel, watercraft or object found in violation of any Federal or State law or provision of the District Code, and further to reflect that the Executive Director is authorized to enter into contracts, on behalf of the District, with private parties for the removal and impounding of any vessel, watercraft or object found in violation of any*

Federal or State law or provision of the District Code. [Emphasis added.] (Id.)

As a result, the district court and Ninth Circuit properly found that the Respondent did have authority, other than pursuing an injunction, to enforce its regulations of vessels (including Respondent's code sections 4.35 and 4.36) within the Respondent's jurisdiction at the time Petitioners' vessel was noticed, seized and later destroyed.

B. Petitioners' Due Process Rights Were Not Violated, as Respondent Provided Proper Notice of the Seizure and Destruction of the Vessel and Provided an Opportunity for a Post Storage Hearing and Opportunity to Retrieve the Vessel Upon Paying Appropriate Seizure and Storage Fees.

Respondent did provide notice and post-storage hearing opportunities to the registered and legal owners of the vessel.

The Respondent protected Petitioners' constitutional due process rights by sending notice of the vessel seizure with an opportunity for a post storage hearing to the legal and registered owners of the property by certified mail as required by Respondent's code section 8.25(a)(5), all of which were returned to Respondent, because, as Petitioners have admitted, Petitioners did not follow appropriate vehicle code provisions specifically enumerated in Vehicle Code section 9865, applicable to the registration of Petitioners' vessel states in pertinent part:

> Any holder of a certificate of number shall notify the department within 15 days, if his address no longer conforms to the address appearing on certificate and shall, as part of such notification, furnish the department with his new address.

It is undisputed that Petitioners did not follow the vehicle code and therefore the due process notices sent by the District to the registered and legal owners of the vessel alerting the owners to the Respondent's actions and offering the owners post storage hearings were never received. Had Petitioners followed the required vehicle code provisions, Petitioners would have received the notices that were sent to the registered and legal owners of the vessel alerting them to the seizure and post storage hearing opportunities.

1. Petitioners Had Actual and Constructive Notice of the Seizure and Pending Destruction of the Vessel.

The seizure was shown on three local television news networks in the area, which have been transcribed and certified. Specifically, Channel 10 KGTV news, Channel 6 XETV news, and Channel 8 KFMB news, showed the seizure of the vessel, and recorded watchman James Morgan acknowledging the vessel seizure while being interviewed on the television news videotapes as the vessel was actually being seized. The videotapes also show Respondent's Harbor Police officer calling for the owner to come forward or the vessel may be destroyed. Also, the Union Tribune, the San Diego newspaper of general circulation, reported in two news articles about the seizure and possible destruction of the vessel and

noticed the owner to come forward or the vessel may be destroyed.

2. Respondent's Conduct During the Post-Seizure Period Cannot Support a Due Process Claim as Respondent Was Not Required to Conduct a Lien Sale.

Petitioners contend that the vessel was registered with the DMV and, therefore, California Harbor and Navigation Code section 500 et seq. dictated the notice and disposition procedures that the Respondent had to follow regarding the vessel. In Petitioners' view, the Respondent failed to follow several significant procedures mandated by Harbors and Navigation (H&N) Code.

H&N code section 522, entitled "Abandoned hulks within municipal limits, disposition, claim of ownership, fee" allows the Respondent to destroy a vessel when it is "abandoned." H&N code section 522(a). But, where a "registration number appears on the watercraft, the municipal corporation or other public corporation . . . shall send the notice to the last registered owner and the disposition shall be handled as a lien sale under H&N code section 504." Petitioners allege that the Respondent violated these code provisions by destroying the vessel without conducting a lien sale.

Furthermore, H&N code section 526 imposes several procedural safeguards before the disposition of an abandoned vessel. Specifically, section 526 requires the Respondent, inter alia, to appraise an abandoned vessel before destruction and send notice of removal within 48 hours of removal to the owner, legal owner

and any other person known to have an interest in the property. If the Respondent cannot find the registered or legal owner, it must publish notice of removal for at least two weeks in succession in one or more daily papers. (H&N code section 526.) Petitioners allege that the Respondent did not appraise the vessel, did not send notice of removal to all interested parties and did not, in the alternative, publish notice of removal in a daily paper.

However, in this case, Petitioners cannot show a failure to follow state or local ordinances because the provisions of the H&N code they point to do not bind the Respondent.

California Harbors and Navigation Code section 500 et seq. is commonly known as the "Boaters Lien Law" and provides procedures for parties holding possessory liens against boats to recover their interest by forcing a lien sale. (*See*, H&N code section 500 et seq.) Sections 522 and 526 of the Harbor and Navigation Code give public entities authority to dispose of abandoned vessels in accordance with the procedures provided therein. However, nothing in Sections 522 or 526, or elsewhere in the H&N code section 500 et seq., purports to limit a public entity's authority to dispose of boats taken into custody for other reasons, such as being in violation of federal, state and local law and regulations related to anchoring in the San Diego Bay's waterways.

Likewise, Respondent's code section 8.25 does not require the Respondent to conduct a lien sale for every registered boat impounded for some reason. Respondent's code section 8.25(4) addresses the

Respondent's authority to dispose of vessels and procedures as follows.

> If the owner or agent of any such vessel, watercraft or object cannot be found within Thirty (30) days, or refuses upon demand to pay the lawful costs and expenses as provided above, the District may sell the property at public auction after publication of sale is advertised in a newspaper of general circulation at least Five (5) days prior thereto, *or the District may keep, destroy, or otherwise dispose of such property*. (Emphasis added.)

The Respondent complied with it procedures as mandated in Respondent's code section 8.25. Moreover, on March 19, 2002, the Respondent, in response to a letter sent by the owner's agent, sent the agent a letter informing him that "the owner of the vessel may come and claim it at any time upon presentation of proof of ownership and after payment of all impound, towing, and storage fees incurred as of the date of retrieval."

Petitioners did not attempt to retrieve the vessel by paying the impound, towing and storage fees owned within thirty days, in fact several more months passed before the disposition of the vessel. Thus, the district court and Ninth Circuit properly found that the Respondent had authority to destroy the vessel.

IV.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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